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Supreme Court of the United States

October Term, 1943

No. 434

MORRIS U. SCHAPPES,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF GENERAL SESSIONS OF THE COUNTY OF NEW YORK

RESPONDENT'S BRIEF

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INDEX

PAGE

OPINION BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

STATEMENT OF CASE 2

ARGUMENT 4

I—The trial court's refusal to compel production of the committee minutes was correct as a matter of law 5

A. The doctrine of the separation of powers fully warranted the non-production of the minutes taken at the private hearings 6

B. In any event, the elements of confidentiality and secrecy render privileged the statements requested by the defendant 7

1. The importance of confidentiality in the Committee's work 7

2. The sound rule which clothes the proceedings of certain investigative bodies, such as the grand jury, with secrecy should apply here 9

3. Since the disclosure of the statements requested by the defendant would have been "prejudicial to the public interest", they must be deemed privileged 10

II—Regardless of the correctness of the trial court's ruling, the petitioner suffered no constitutional deprivation and, accordingly, no federal question is presented 11

III—The petition for a writ of certiorari should be denied ... 15

CASES

PAGE

Alford v. United States (1931) 282 U. S. 687 13

Beatson v. Skene (1860) 5 H. & N. 838 11
Betts v. Brady (1942) 316 U. S. 455 ..... 5, 11, 12, 13
Blitz v. United States (1894) 153 U. S. 308 13
Boehm v. United States (C. C. A. 8th Cir. 1941) 123 Fed. (2d) 791, cert. den. (1942) 315 U. S. 800 ..... 5, 13, 14

Comm. v. Gettigan (1925) 252 Mass. 450, 148 N. E. 113 9
Comm. v. Goldberg (1912) 212 Mass. 88, 98 N. E. 692 9
Comm. v. Slavski (1923) 245 Mass. 405, 140 N. E. 465 12

Dowdell v. United States (1911) 221 U. S. 325 12

Edwards v. United States (1941) 312 U. S. 473 12

Heard v. United States (C. C. A. 8th Cir. 1919) 255 Fed. 829 13
Hearst v. Black (Ct. App. D. C. 1936) 87 Fed. (2d) 68 6

Kilbourn v. Thompson (1880) 103 U. S. 168 7

Lisenba v. California (1941) 314 U. S. 219 11

Matter of La Guardia v. Smith (1942) 288 N. Y. 1 ..... 6, 7
McGrain v. Daugherty (1927) 273 U. S. 135 7

Palko v. Connecticut (1937) 302 U. S. 319 ..... 11, 12
People v. Davis (1884) 52 Mich. 569 10
People v. Schainuck (1941) 286 N. Y. 161 10
People v. Walsh (1933) 262 N. Y. 140 ..... 5, 6, 7, 10

Riggins v. State (1915) 125 Md. 165, 93 Atl. 437 10

Snyder v. Massachusetts (1934) 291 U. S. 97 ..... 11, 12
Springer v. Philippine Islands (1927) 277 U. S. 189 7
State Educational System (Teachers Union) (1941) 285 N. Y. 1 ..... 6, 7
Storm v. United States (1876) 94 U. S. 76 13

United States v. Butler (1936) 297 U. S. 1 7

Walker Mining Co. v. Industrial Accident Commission (1939) 35 Cal. App. (2d) 257, 95 Pac. (2d) 188 12

STATUTES AND CONSTITUTIONAL PROVISIONS

	PAGE
New York—	
Labor Law, sec. 524	9
Laws 1941, ch. 100, p. 310; ch. 945, p. 2200	8
Penal Law, secs. 1620, 1620-a	1
Public Health Law, secs. 25, 343-ll, 437	9
Tax Law, secs. 219-i, 384	9
United States—	
Constitution: Amendment VI	12
Amendment XIV	2, 12
Judicial Code, sec. 237 (b) 28 U. S. C. A. sec. 344 (b)	2

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RESPONDENT'S BRIEF

Opinion Below

The petitioner was convicted of the crime of perjury in the first degree (Penal Law, §§ 1620, 1620-a), in the Court of General Sessions of New York County, State of New York (4894-5).*

On appeal to the Appellate Division of the Supreme Court of the State of New York, First Department, that Court unanimously affirmed the judgment of conviction, with a memorandum reported in 264 App. Div. 917. On further appeal to the Court of Appeals, the judgment of conviction was affirmed, LEHMAN, Chief Judge, dissenting in a memorandum; the affirmance is reported in 291 N. Y. 575.

* References are to folios in the printed record.

Jurisdiction

The jurisdiction of this Court is invoked under section 237(b) of the Judicial Code as amended [28 U. S. C. A., § 344(b)] upon the claim that the petitioner was denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Question Presented

Three of the People's witnesses had previously testified before a Legislative Committee at private hearings. At the trial, they admitted that they had made statements which were at variance with their trial testimony. They were cross-examined thereon exhaustively and at length.

The question presented is whether the trial court's ruling refusing the petitioner's demand for the transcripts of that prior testimony for use on cross-examination constituted a denial of due process of law.

Statement of Case

A Joint Committee of the Legislature of the State of New York, known as the Rapp-Coudert Committee, had been set up to investigate, among other things, the extent to which "subversive activities may have been permitted to be carried on in the schools and colleges" of New York State [Peo's Exhs. 1 and 2, clause 1, subd. (i)]. The petitioner, a teacher at the College of the City of New York, called as a witness before the Committee, acknowledged that he was a member of the Communist Party.[1] In testifying as to the existence and the extent of Communist activities at City College, the petitioner committed perjury, and there followed an indictment charging him, in four separate counts, with perjury in the first degree (11-28).

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1. It was independently established that the doctrines enunciated by the Unit of the Party at City College called for action that was "subversive".

No purpose is to be served by detailing the proof establishing the guilt of the petitioner—described, we note, by the Appellate Division as "overwhelming" (264 App. Div. 917). Suffice it to observe that three of the People's witnesses, William M. Canning, Annette Sherman, and Oscar Zeichner, testifying, in effect, that there were at least 36 members of the Communist Party at City College, conclusively proved the allegations of the indictment's first count, namely, that Schappes had lied when he swore that there were only four such members prior to 1938, and only himself after that date and until December, 1939 (734-7, 3766, 3783).[2]

The charge did not, however, depend exclusively upon the testimony of the three witnesses named. Confirmation of their evidence is found both in the testimony of another City College teacher, Francis Williamson (2120, 2125),[3] and in certain published statements of Schappes himself (4170, 4183, 4195, 4199, 4237-8, 4259-60).[4]

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2. It is of the utmost significance, we believe, that *of the three persons named by the defendant, in addition to himself, two* (Wardlaw and Chaikin) *were dead, while the third* (Friedman) *was in Massachusetts and "publicly known" as a Communist* (733-7, 781, 785). Markoff, *"the only additional person"* the defendant could name "who was at any time a member of the Teachers Union and of the Communist Party" *was also dead* (779, 780-1, 785, 786).

3. Williamson left no doubt that Canning was a member of the Communist Party and that Schappes knew it. For instance, he declared that he was approached by both Schappes and Canning together and asked by both to join the College Communist Unit (2120, 2125).

4. Thus, in an issue which appeared in the summer of 1937—at a time when, according to the petitioner, the Communist Unit had only two members—Schappes had written (4195):

> "At the College, the Communist Party Unit *has increased its membership manifold* in the past few years"

and in the April 1938 issue—when, according to Schappes, he was the only member of the Unit at the College, the paper recited (4259):

> "The first two [Unit] *meetings were devoted to a discussion* of the Party's peace program."

Argument

The petitioner complains that he was unable adequately to cross-examine three of the People's witnesses because he was not permitted to inspect transcripts of testimony previously given by them at private hearings of the Joint Legislative Committee. Upon their first appearance before the Committee, each of these witnesses had claimed that he had not been a member of the Communist Party.

It it evident that they had, as each admitted upon the trial, previously lied concerning that item, and upon their second appearance before the Committee, each retracted his false statement. Indeed, thereafter and throughout the trial, all steadfastly maintained that they had, in fact, been members of the Communist unit and recounted various incidents which branded the petitioner's testimony before the same Committee as perjurious.

That the witnesses had previously made the false statements in question, though readily explainable, was, of course, a factor which the petitioner was entitled to rely upon in attacking their credibility, and this he did to the hilt—both during the summation and during the exhaustive cross-examination to which the witnesses were subjected. Virtually the only restriction upon these cross-examinations occurred when defense counsel sought to procure transcripts of the witnesses' original testimony before the Legislative Committee for the purpose of emphasizing still further the fact that they had then made the false statements to which reference has been made. This limitation —the point complained of here—was, we note, a result not of any objection on the part of the prosecution (1307)—which, in any event, had neither possession nor control of the testimony—but of a representative of the Committee itself (1309-11, 1672).

After consideration, the court sustained the Committee's objection and refused to compel production of the minutes.

The petitioner seeks to magnify the incident and to distort it into an "expression of disregard for traditional and constitutional safeguards" (Petitioner's Brief, p. 35), by invoking the "due process of law" clause of the Constitution.

The trial court's ruling, we submit, was in accord with the law of New York State; but even if regarded as incorrect, the error would hardly constitute a denial of due process within the meaning of the Federal Constitution—"a denial of fundamental fairness, shocking to the universal sense of justice." [*Betts* v. *Brady* (1942) 316 U. S. 455, 462.] [5]

I

The trial court's refusal to compel production of the committee minutes was correct as a matter of law [In answer to Petitioner's Brief, Point III, pp. 23-31].

The Court of Appeals of New York State has recognized that where a trial witness has made a prior inconsistent statement, the opposing party is entitled to use that statement for cross-examination purposes if the trial judge after inspecting the document concludes that its disclosure is proper. [See *People* v. *Walsh* (1933) 262 N. Y. 140.] More specifically, production and disclosure of the statement may be required only (1) if it "is in court" or "in the possession or control of the prosecution" (262 N. Y., at pp. 149-150); (2) if it "reveals contradictory matter" (262 N. Y., at p. 149); and (3) if, "upon inspection," the court finds that publication "would [not] be prejudicial to the public interest" (262 N. Y., at p. 150).

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5. Indeed, this Court denied certiorari in *Bochm* v. *United States* (1942) 315 U. S. 800, a case, very similar to the present, where the precise argument here relied upon was advanced. (See Petitioner's Brief in *Bochm* case, pp. 28-35.)

In this case, the statements were not "in court" or "in the possession or control of the prosecution"; they were "in the possession and control" of an independent legislative organ. In addition, since the material contained in the statements, was of a confidential nature, its "publication" would have been "prejudicial to the public interest"; hence, the statements were "privileged" within the contemplation of the *Walsh* case (262 N. Y., at p. 150). Thus, even had the trial judge inspected them, he would have been prompted by every consideration of fairness and law to withhold them from defense counsel.

We briefly treat these matters.

A. The doctrine of the separation of powers fully warranted the non-production of the minutes taken at the private hearings [In answer to Petitioner's Brief, pp. 23-29]

Although, as we have observed, the assistant district attorney interposed no objection to the defendant's request for the private testimony in question (1308), a representative of the Committee opposed disclosure upon the ground that such testimony represented "private records * * * and confidential data" and had been given to, and was then in the possession of, an "independent and a co-equal body," to wit, the Legislature (1309-10).

In sustaining the Committee's position, the trial judge followed settled principles defining the rights and privileges of legislative investigating bodies. [See *Hearst* v. *Black* (Ct. App. D. C. 1936) 87 Fed. (2d) 68; *State Educational System* (*Teachers Union*) (1941) 285 N. Y. 1; see, also, *Matter of La Guardia* v. *Smith* (1942) 288 N. Y. 1, 5-7.]

These cases reveal that, when the courts uphold the power and independence of a legislative committee, they generally rest their decisions upon the principle of the separation of powers—a principle which this Court has recognized as "inherent in the American constitutional

system." [See *Springer* v. *Philippine Islands* (1927) 277 U. S. 189, 201; see, also, *Matter of La Guardia* v. *Smith, supra,* 288 N. Y. 1, 10, *per* LEHMAN, Ch. J., in dissenting opinion; *Kilbourn* v. *Thompson* (1880) 103 U. S. 168, 190; *McGrain* v. *Daugherty* (1927) 273 U. S. 135.]

The doctrine of separation applies, of course, whether the immunity from judicial interference or compulsion be sought by the legislative branch of the government or by the executive. This principle is no sterile and doctrinaire formulation. Rather, it rests upon the principle that "Courts are not the only agency of government that must be assumed to have capacity to govern." [*Per* STONE, J., dissenting, in *United States* v. *Butler* (1936) 297 U. S. 1, 87.]

B. In any event, the elements of confidentiality and secrecy render privileged the statements requested by the defendant [In answer to Petitioner's Brief, pp. 29-31]

The foregoing authorities establish that the trial court had no power to compel the production of the Committee's minutes under *any* circumstances, but we need not go so far to sustain the action taken in the present case. Under the circumstances presented in this record, the court was bound to respect the Committee's judgment, resting as that did on its own settled policy of secrecy—a policy which, under the rule of *People* v. *Walsh, supra,* 262 N. Y. 140, 150, was patently consonant with the public interest.

1. The importance of confidentiality in the Committee's work

The Resolution of March 29, 1940, which created the Rapp-Coudert Committee, empowered it to investigate and study the entire educational system of the state, with a view to suggesting improvements in the procedure and methods employed in the allocation of state moneys for the maintenance of this system. [See *State Educational System* (*Teachers Union*), *supra,* 285 N. Y. 1, 6.] That

the state appropriated large sums of money for this Committee is eloquent indication of the importance attached to its work.[6]

The investigation might well have been seriously hampered if the testimony requested by the defendant had been disclosed. The Committee had not yet completed its work; hearings were still being held; and prospective witnesses, apprised that their confidences would not be held inviolate, might well have been afraid to give testimony implicating their colleagues in Communist activities at City College.

Thus, the record itself is persuasive that it was of the utmost public importance that the court should recognize the Committee's power to shield the witnesses who had aided, or might later be called upon to aid, in its work.

Indeed, the Committee, undoubtedly concerned over these considerations, adopted a Resolution, on January 14, 1942, **some months prior to this trial,** which expressly prohibited divulgence of testimony given "at a private hearing," without the witness' consent, except for use in correcting or impeaching subsequent testimony by the same witness at other hearings of the Committee, or to facilitate the bringing of a contempt proceeding or perjury prosecution against that very witness (1674-5). The formulation of such a Resolution cogently indicates the Committee's belief that there was a need for confidentiality if a major investigation, then being conducted on behalf of the people of New York State, were to be successful.

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6. For the year 1941, the state appropriated the sum of $2,232,218 for salaries alone in connection with public education (Laws 1941, ch. 100, p. 310); it also set aside a further sum of $100,000 for the Committee's exclusive use (Laws 1941, ch. 945, p. 2200).

2. The sound rule which clothes the proceedings of certain investigative bodies, such as the grand jury, with secrecy should apply here

The propriety of the court's ruling finds support in decisions of the Massachusetts court involving grand jury minutes: it has been held that even though it appeared that a witness had testified inconsistently before the grand jury, the cross-examiner is not entitled to have the witness' testimony before that body produced in court. [See *Comm.* v. *Gettigan* (1925) 252 Mass. 450, 148 N. E. 113; *Comm.* v. *Goldberg* (1912) 212 Mass. 88, 98 N. E. 692.]

Other cases might be cited to illustrate the need to protect from the scrutiny of the individual or the private litigant as well as a need for secrecy—in the interests of the public—of many different types of records; we list a few of them: diplomatic correspondence and communications relating to the apprehension and prosecution of criminals; [*Marbury* v. *Madison, supra,* 5 U. S. (1 Cranch) 137, 144; *Matter of Egan* (1912) 205 N. Y. 147; *People ex rel. Stenstrom* v. *Harnett* (3rd Dept. 1928) 224 App. Div. 127, aff'd 249 N. Y. 606; *Gray* v. *Pentland* (1815) 2 S. & R. (Pa.) 23; *Morris* v. *Creel* (1816) 2 Va. Cas. 49, 50]; selective service board records [*Harris* v. *Walsh* (Ct. of App. D. C. 1922) 277 Fed. 569]; post office records [*Brower* v. *Hinds* (C. C. A. 2nd Cir. 1934) 69 Fed. (2d) 52]; internal revenue records [*In re Huttman* (D. C. Kansas 1895) 70 Fed. 699)]; unemployment insurance records (Labor Law, § 524); venereal disease reports (Public Health Law, §§ 25, 343-ll); druggists' records of narcotic prescriptions (Public Health Law, § 437); income tax returns (Tax Law, §§ 219-i, 384).

3. Since the disclosure of the statements requested by the defendant would have been "prejudicial to the public interest", they must be deemed privileged [*People* v. *Walsh*, 262 N. Y. 140, 150]

We recognize that, under ordinary circumstances, the production of a statement previously made by a witness testifying against the accused, at variance with his trial testimony, may be compelled. [*People* v. *Walsh, supra,* 262 N. Y. 140; *People* v. *Schainuck* (1941) 286 N. Y. 161.] We do not believe, however, that those decisions require the court to insist upon disclosure of minutes of private legislative hearings, if privileged or confidential—as they clearly are—or if such disclosure would be prejudicial to the public interest.

Indeed, in both of the above cited decisions—although the statements there in issue did not contain confidential information—the Court of Appeals recognized the possibility that the privileged character of the information sought to be used might warrant the trial court's refusal to permit its disclosure. [See *People* v. *Walsh, supra,* 262 N. Y. 140, 150; *People* v. *Schainuck, supra,* 286 N. Y. 161, 163.] Thus, in the *Walsh* case, *supra,* 262 N. Y. 140, the Court observed (p. 150):

> "It is conceivable, however, that the court upon inspection may find matter, the publication of which would be **prejudicial to the public interest. In such case the statement would be privileged.**"

In laying down this *caveat*—in a case which did not call for it upon its facts—the Court merely followed the doctrine formulated in earlier cases, cited with approval in the *Walsh* case. [See *People* v. *Davis* (1884) 52 Mich. 569; *Riggins* v. *State* (1915) 125 Md. 165, 93 Atl. 437.]

In short, where there is a clash of two principles—one for the benefit of the individual and one in the interests of the state or of the public—it seems to us that the interests of the public must be deemed paramount. [See

Beatson v. *Skene* (1860) 5 H. & N. 838, 853.] Here, the interests of the public—through one of its legislative committees—were, as we have indicated, substantial. While the question might present some difficulty if the interests of the individual—the petitioner—were also of a vital sort, such as in the turning up of conclusive evidence of his innocence, this was far from the actual situation. His interest—simply to use the statements further to labor a collateral inquiry, developed, in any event, to exhaustive lengths—seems most nebulous. Clearly, no injustice was done, no rule of law violated.

II

Regardless of the correctness of the trial court's ruling, the petitioner suffered no constitutional deprivation and, accordingly, no federal question is presented.

In any event, the petitioner may not properly assert a constitutional deprivation or a denial of due process such as would bring his case within this Court's jurisdiction unless he can establish that the error complained of "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." [See *Snyder* v. *Massachusetts* (1934) 291 U. S. 97, 105; see, also, *Betts* v. *Brady* (1942) 316 U. S. 455, 473; *Lisenba* v. *California* (1941) 314 U. S. 219, 236; *Palko* v. *Connecticut* (1937) 302 U. S. 319, 325.]

While it is patent that the trial judge's refusal to permit the petitioner the use of the Legislative Committee minutes, fell far short of any such fundamental injustice or denial of due process, the petitioner seeks a detour to constitutional deprivation through invocation and distortion of the basic rights of "confrontation" and "cross-examination" (Petitioner's Brief, pp. 14-16). We note, in passing, that, contrary to the petitioner's suggestion (Brief, p. 15), neither of these rights or privileges

is specifically guaranteed him in the Constitution; there is no provision dealing directly with cross-examination and, while the Sixth Amendment declares that "the accused shall enjoy the right * * * to be confronted with the witnesses against him," that "applies only to trials in federal courts". (*Betts* v. *Brady, supra,* 316 U. S. 455, 461.) Accordingly, if there be any constitutional deprivation in this regard, it must be of the shocking sort of injustice envisaged by the due process clause in the Fourteenth Amendment. [*Cf. Palko* v. *Connecticut, supra,* 302 U. S. 319, 322, *et seq.*]

At any rate, since the petitioner not only was "confronted with the witnesses against him" (Constitution of United States, Amendment VI), but also cross-examined them—the three in question—at considerable length, it is difficult to perceive how these principles are involved. The argument apparently is that the right to cross-examine witnesses imports a right to cross-examine upon any relevant, though collateral, subject, at any length, upon any ramification, without any curtailment by the trial judge.

Of course, no such right is guaranteed in the Constitution—either by the Sixth Amendment, by the Fourteenth, or by any other provision. The privileges of confrontation and of cross-examination are ordinarily invoked and considered where the defendant has been denied the opportunity to be present at his trial or where he has had no opportunity whatever to cross-examine and, even in that type of situation, the doctrines are subject to many exceptions. [See *Snyder* v. *Massachusetts, supra,* 291 U. S. 97; *Edwards* v. *United States* (1941) 312 U. S. 473; *Dowdell* v. *United States* (1911) 221 U. S. 325; *Walker Mining Co.* v. *Industrial Accident Commission* (1939) 35 Cal. App. (2d) 257, 95 Pac. (2d) 188; *Comm.* v. *Slavski* (1923) 245 Mass. 405, 140 N. E. 465.]

Once the defendant is confronted by the witnesses and does cross-examine them, the extent of cross-examination, at least as to credibility and other collateral matters, rests

within the discretion of the trial court. [See *Alford* v. *United States* (1931) 282 U. S. 687, 694; *Blitz* v. *United States* (1894) 153 U. S. 308, 312; *Storm* v. *United States* (1876) 94 U. S. 76, 85.]

It may be true that, in certain instances, where the defense seeks to examine into an important issue and "The trial court cut[s] off *in limine* all inquiry on" the subject, the curtailment may be deemed equivalent to denial of the right of cross-examination itself. [See *Alford* v. *United States, supra,* 282 U. S. 687, 693-694; see, also, *Heard* v. *United States* (C. C. A. 8th Cir. 1919) 255 Fed. 829, 832.] An asserted denial of due process, this Court wrote in *Betts* v. *Brady, supra,* 316 U. S. 455, 462,

> "is to be tested by an appraisal of the totality of facts in a given case."

So tested, the petitioner's position is revealed as utterly untenable. Numerous factors—that the transcripts sought were for use in cross-examining upon the collateral question of credibility; that the witnesses had already admitted, and the People conceded, that they had previously lied in the respect claimed; that the petitioner's attorney did cross-examine the witnesses at great length; that he exhaustively developed and harped upon the subject in question, both during cross-examination and summation; and that overwhelming proof of guilt came not alone from these witnesses but also from others called by the prosecution—true, in smaller part—and from the obviously fabricated testimony of the petitioner himself—all attest to the absurdity of the claim of prejudicial error and constitutional deprivation.

As a matter of fact, the precise question here raised has already been adversely decided.

> See *Boehm* v. *United States* (C. C. A. 8th Cir. 1941) 123 Fed. (2d) 791, cert. den. (1942) 315 U. S. 800.

In the *Boehm* case, the defendant was convicted of perjury as a result of giving false testimony in an investigation conducted by the Securities and Exchange Commission. As here, several prosecution witnesses called to establish the falsity of that testimony had also testified before the same body and, as they acknowledged at the tral, had there lied about a certain matter which constituted a vital issue at the trial; as here, the defendant, though he cross-examined the witnesses at length upon their prior perjury, sought transcripts of the prior testimony for the purpose of further developing the subject, and the trial court refused to compel production thereof.

The Circuit Court of Appeals, treating the general subject in the light of principles adduced by federal courts—which differ from the New York courts on this score—stated that it did not approve the trial judge's ruling and denominated it "error". [123 Fed. (2d), at pp. 807-808.] Declaring, however, that "the substantial rights of the defendant were not affected" (p. 808), it affirmed the conviction.

In urging that the error warranted a reversal, the defendant advanced the same contentions as does the petitioner herein: first, that production of transcripts containing the witnesses' prior false statements was obligatory (p. 805)

> "because it was relevant and material for the purpose of impeachment and would go directly to the weight and credibility of these witnesses" (*cf.* Petitioner Schappes' Brief, pp. 17-18);

and, second (pp. 805-806),

> "that appellant's right to the transcripts was incidental to his right to cross examination derived from the constitutional right to be confronted with the witnesses against him." (*cf.* Petitioner Schappes' Brief, pp. 18-22.)

Stating that "it is apparent from the record that justice has been done" (p. 807), and that "the substantial rights of the defendant were not affected" (p. 808), the

court brushed aside as specious the claim concerning deprivation of the rights of confrontation and cross-examination (pp. 805-806):

> "Of course there is no constitutional provision, Rule of Procedure or statute which requires the government to produce along with its witnesses in criminal prosecutions, the statements the witnesses may have made on occasions other than on the trial, * * * the witnesses to such extraneous statements of the prosecuting witnesses are not the witnesses with whom the constitution requires the accused to be confronted. On the contrary, a conviction on their testimony would violate the constitution. The trial court's refusal to compel the production of statements made by the government's witnesses before other witnesses on occasions other than on the pending trial manifestly affected no constitutional right of appellant."

III

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November, 1943